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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, Respondent,

DOROTHY MAE DRIGGERS,

MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors,
by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;*

DOROTHY MAE DRIGGERS, Administratrix of the
Estate of Oscar Driggers, Jr., Deceased;

B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest

PETITIONER'S REPLY BRIEF TO BRIEFS OF DOROTHY MAE DRIGGERS AND B & B SUPPLY COMPANY IN OPPOSITION

FRANCIS L. YOUNG, JR.
THOMAS S. JACKSON
1701 K Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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ARGUMENT

I

Decisions Below Are in Conflict

B & B Supply Company, hereinafter referred to as "Supply Company", is incorrect in asserting that there is no conflict in decisions of the lower courts save in "single trans-

action" cases, and that only in such cases has a foreign defendant been found beyond the jurisdiction of the forum court.

See, for instance, *Taylor v. Portland Paramount Corporation*, 383 F.2d 634 (9th Cir., October 19, 1967), wherein the conduct outside of Oregon of Defendant Elizabeth Taylor "continuously since the early part of the year 1962" was alleged to have injured the exhibition property rights and business interests in Oregon of plaintiff, an Oregon film distributor, yet the court of appeals found no jurisdiction and reversed the trial court.

Supply Company cites the California case of *Regie Nationale des Usines Renault, etc. v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962), wherein the California forum courts upheld their jurisdiction over a foreign automobile manufacturer, but neglects to mention the later ruling in *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292 (6th Cir., 1964), where the court considered the same distribution scheme and similar corporate relationships and activities and, applying the principles of *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), ruled that the forum court had no jurisdiction over the foreign automobile manufacturing corporation.

Supply Company says that the recent ruling of the same District Court of Appeal which is respondent here in *Gill v. Surgitool Incorporated*, 64 Cal. Rptr. 207 (1967), involved a "single transaction" case. This is not so, as a careful reading of the affidavit as quoted in the opinion indicates.

> "* * * [W]e have also at the request of one or more of our doctors who use these valves in surgery, corresponded with Surgitool, Inc., and negotiated with the company for the modification of valves and return to us of the modified valves from Pittsburgh." 64 Cal. Rptr. 210, 211.

At page 9 of her brief in opposition, Dorothy Mae Driggers, plaintiff below, indicates that the case at bar is similar, in its facts and result, to the case of *Cosper v. Smith & Wesson Arms Co.*, 53 Cal.2d 77, 346 P.2d 409. This is not so. In the *Cosper* case there existed a "manufacturer's representative", a California resident located in California, who was employed by defendant Smith & Wesson to handle complaints, service users, and otherwise generally to promote the sale and use of Smith & Wesson products in California—and this manufacturer's representative was *paid directly* by Smith & Wesson. The existence of this individual was apparently the deciding factor in the *Cosper* case. There is no such representative in the case at bar. Wyeth-Scott conducted no activities whatever in California.

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, * * *". *Hanson v. Denckla*, 357 U.S. 235, 253.

II

The Jurisdictional Point Is Not Moot

Supply Company says that Petitioner has rendered its position in this Court moot because, under compulsion, it has answered the complaint in the trial court. Supply Company thus argues that the California courts can arbitrarily deprive Petitioner of any effective opportunity to be heard in this Court. Such a position is contrary to reason and the law.

Petitioner had obtained an extension of time within which to seek appellate review until March 25, 1968. After it was

refused a hearing in the Supreme Court of California on March 1, 1968, Petitioner sought an additional extension of time to permit it to seek redress in this Court, in which, by Federal statute (28 U.S.C. § 2101(c)), it had 90 days from entry of the final order below to file its petition for certiorari. This motion for additional time was denied by the trial court on March 19, 1968 (App. 10). Petitioner then had two alternatives open: to plead to the merits under protest, or stand aloof and risk a default judgment. No litigant should be placed in such a dilemma as that in which Supply Company would place Petitioner. Petitioner chose what appeared to be the lesser of two evils.

> "* * * To borrow a maxim from the civil side of the common law, where there is a wrong done, with injury, there is a remedy." *Dancy v. United States*, 361 F.2d 75, 124 U.S. App. D.C. 58, 62 (1965).

This Court has said that review will be allowed where its judgment will have some material effect, even though petitioner's position may appear moot. *Pollard v. United States*, 352 U.S. 354, 358, 1 L. Ed. 2d 393, 77 St. Ct. 481 (1957). Clearly, a determination by this Court in favor of Petitioner on the merits will be of material effect. And surely no lower court would be so rash as to attempt to proceed with the case below if this Court should grant certiorari.

The California cases cited by Supply Company are not apposite. In one of them the quoted language is merely dicta in a case in which the trial court did stay the effectiveness of its order pending review. In the others no effort was made by the defendant to seek appellate review of the jurisdictional point before pleading to the merits, or the defendant simply coupled his first raising of the jurisdictional point with a plea to the merits.

It will be noted that Dorothy Mae Driggers, in her brief in opposition, does not even raise this objection, and concedes that this Court has jurisdiction.

CONCLUSION

It is submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

FRANCIS L. YOUNG, JR.
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1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for Petitioner